



UNIVERSITY OF TORONTO
FACULTY OF LAW



ANGLO-CANADIAN LEGAL HISTORY

VOLUME 1

Professor Jim Phillips
Professor Simon Stern

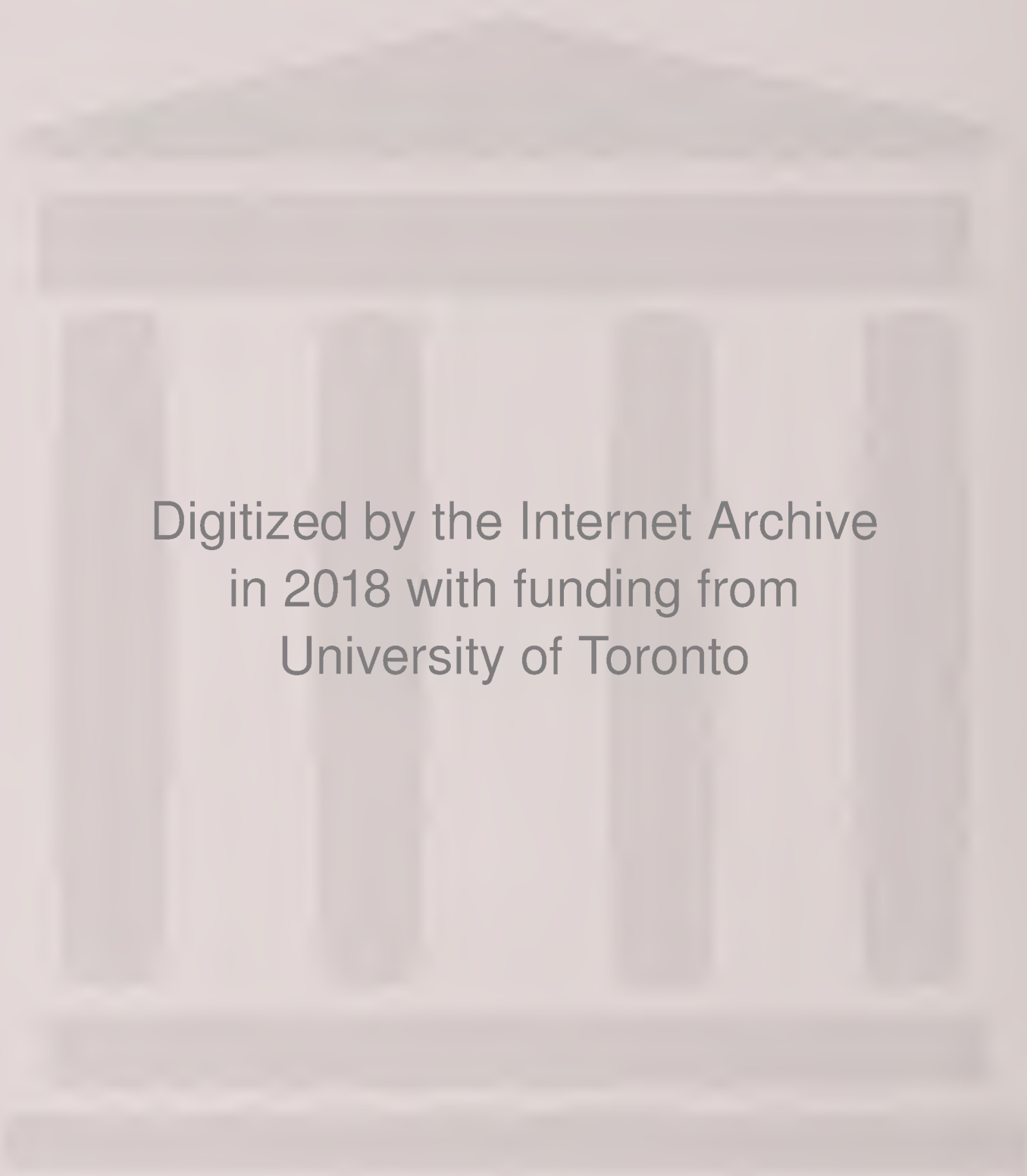
Winter 2011

ANGLO-CANADIAN LEGAL HISTORY

VOLUME 1

Professor Jim Phillips
Professor Simon Stern

Winter 2011



Digitized by the Internet Archive
in 2018 with funding from
University of Toronto

<https://archive.org/details/anglocanadianleg01phil>

ANGLO-CANADIAN LEGAL HISTORY

Professor Simon Stern; Professor Jim Phillips

Contents - Volume 1

Note - Summary of English Criminal Justice in the Eighteenth Century

Douglas Hay, 'Property, Authority and the Criminal Law,' in Hay et al, *Albion's Fatal Tree* (1975)

John Beattie, 'Scales of Justice: Defence Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries,' (1991) 9 *Law and History Review* 221

Old Bailey Sessions Papers - Three Trials

John Langbein, *The Origins of Adversary Criminal Trial* (2003), pp. 10-66

Note - Criminal Procedure in New France and the Reception of English Law

Jim Phillips, 'The Criminal Trial in Nova Scotia, 1749-1815,' in Phillips and G. Blaine Baker, eds., *Essays in the History of Canadian Law: Volume VIII - In Honour of R.C.B. Risk* (1999)

Douglas Hay, 'The Meanings of the Criminal Law in Quebec, 1764-1774,' in L.A. Knafla, ed., *Crime and Criminal Justice in Europe and Canada* (1981)

Note - Debates over the Pardon

John Beattie, 'Looking Back at Property, Authority and the Criminal Law,' and Douglas Hay, 'Writing about the Death Penalty,' both in (2006) 10 *Legal History* 15 and 35

Jim Phillips, 'The Operation of the Royal Pardon in Nova Scotia, 1749-1815,' (1992) 42 *University of Toronto Law Journal* 401

Note - The Historiography of the Penitentiary

Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution* (1978), pp. 3-14 and 174-206

Peter Oliver, 'Order is Heaven's First Law: The Tory Origins of Upper Canada's Penitentiary,' in Oliver, *Terror to Evil-Doers: Prisons and Punishment in Nineteenth-Century Ontario* (1998)

Christopher Brooks, 'Apprenticeship and Legal Training in London, 1700–1850,' in Brooks, ed., *Lawyers, Litigation, and English Society Since 1450* (1998), pp. 149-78.

John H. Langbein, 'Chancellor Kent and the History of Legal Literature,' (1993) 93 *Columbia Law Review* 547

D.J. Ibbeston, 'Report and Record in Early Modern Common Law,' in Alain Wijffels, ed., *Case Law in the Making* (1997), Vol 1, pp. 55-68; Vol 2, pp. 27-48 (the latter set are illustrative examples)

Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (2003), pp. 294-298 plus endnotes (482-85)

Christopher Moore, *The Law Society of Upper Canada and Ontario's Lawyers, 1797-1997* (1997), pp. 13-34 and 42-64

Philip Girard, 'The Making of the Legal Profession in British North America: Reform vs. Revolution,' unpublished 2010

Anne Matthewman, 'Volumes of History: The Legal Profession and The Development of Law Reporting in Ontario,' (1996) 21 *Canadian Law Libraries* 7.

Robert Stevens, 'Harvard Sets the Style,' in Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (1983), pp. 51-72

G. Blaine Baker, 'Legal Education in Upper Canada: The Law Society as Educator,' in D. Flaherty, ed., *Essays in the History of Canadian Law: Volume II* (1983), pp.

Thomas P. Gallanis, 'Adversarial Culture, Adversarial Doctrine: Cross-Examination and Leading Questions in the State Trials on CD-ROM,' (2003) 24 *Journal of Legal History* 86

THE CRIMINAL LAW OF ENGLAND IN THE EIGHTEENTH CENTURY

The first reading in the section on criminal justice assumes rather than provides a basic knowledge of the system. This short description is intended to fill that gap, and should be read before you read the Hay article. Also included here is some historiographical context for the Hay piece, and some questions to think about when reading it.

What is often referred to as the “unreformed” English criminal justice system of the period prior to c. 1820 was marked by three features which make it seem very different to our contemporary system.

1) Capital Punishment

First, the system relied very largely on physical punishment, especially capital punishment, and hardly used what is now the principal method of criminal punishment, imprisonment. The structure of the criminal law had evolved over a few centuries. The law had long divided offences between felonies and misdemeanours, broadly a distinction between what was considered more and less serious offences. At common law all felonies were capital offences, except for petty larceny, which was theft of goods worth one shilling or less. Thus all other property offences - grand larceny, robbery, burglary etc - and the serious offences against the person of homicide and rape - were capital, as were a miscellaneous set of other offences - arson, treason and a few others. For non-capital offences the punishments prescribed were physical (whipping and being set in the pillory) or monetary (fines).

In the medieval and early modern periods this regime was tempered by something called benefit of clergy, which relieved from capital punishment for a first offence. Initially only available to the clergy, its availability was expanded in a variety of ways until by the eighteenth century everybody could claim it. An offender would be convicted, would claim benefit of clergy, and be burned on the thumb (a method of criminal record keeping!). However this expansion of clergy was accompanied by a parallel development by which statutes progressively removed offences from the reach of benefit of clergy. Offences such as murder, treason, rape and burglary were removed from clergy in the Tudor period, and others over time. The result of these two processes - expanding who could claim benefit of clergy and reducing the offences for which it could be claimed meant that by the late 17th century everybody could get clergy but for only a limited range of felonies. In practical terms this limited range encompassed grand larceny and manslaughter. Thus basic theft was effectively not capital, being either a misdemeanour (petty larceny) or a clergyable felony (grand larceny). Other property offences like burglary (break and enter at night with intent to steal) and robbery (stealing with violence or its threat) were capital offences.

At the beginning of Hay's article reference is made to the expansion of capital offences that took place in the eighteenth century. This process had actually begun in the late 17th century. What happened was that Parliament passed statutes making particular thefts (which would otherwise be grand larceny) ‘capital without benefit of clergy.’ Picking pockets, shop lifting, thefts by domestic servants, and others, were all made capital offences in this way. Thus what would otherwise have

been grand larceny was made capital by reference to the value of goods stolen, the place from which they were stolen, the identity of the victim, the method etc. Hay gives some further examples. One often reads that there were 200 capital offences by 1800, and most of these were like this - particular kinds of thefts. It is usually argued that this expansion of the capital code was carried out at the behest of special interests keen to protect new forms of property. A notable example is the so-called Black Act of 1723, which in the interests of protecting fishing and other rights newly claimed by the gentry, often in opposition to traditional peasants' rights, prescribed as capital dozens of activities such as attacking deer, stealing rabbits or hares from warrens, breaking down the heads of fish ponds, etc.

The vast expansion of capital offences did not mean that thousands of people were hanged every year. A variety of processes prevented this. One was prosecutorial and jury discretion, discussed below. Another was the royal power of pardon, discussed in Hay's article. A convicted prisoner could be pardoned by the trial judge or "left to hang." Those left to hang could still petition the crown for clemency, and it is this process of petitioning that Hay discusses. Overall, some 30 men and women were hanged each year at Tyburn, the London gallows, in the first half of the 18th century, which was some 60% of those capitally convicted. The percentage went down after c. 1750. Persons pardoned either after trial or later were often transported, and indeed transportation (to the American colonies) was the principal 'secondary' punishment after it was introduced in 1718. The American revolution put a stop to it, causing a crisis of where to put convicts ordered to be transported that was solved by the establishment of penal colonies in Australia in the late 1780s.

2) Private Prosecution.

The second notable feature of the 18th century system was its reliance on private initiative in the apprehension and prosecution of alleged criminals. Policing before the 1820s was very limited. Parish constables were ordinary citizens who served for a year, taking their turn and carrying out a host of administrative responsibilities. These included arresting people for whom a Justice of the Peace (JP, aka a magistrate) had issued a warrant, or conducting a search as similarly ordered but there was no expectation that they would investigate a complaint of crime or take a prosecution forward. Those duties devolved on the victim or, in the case of homicide, the victim's family. The major cities did have night watches, but they were seen as a preventative force, not as an investigatory one. Similarly, the JPs had the power to issue arrest or search warrants, and to commit suspected persons to prison, but they took no active role in investigating and prosecuting. They were locally prominent persons unpaid (remunerated by fees), not legally trained, and largely unsupervised.

Hay discusses the principal ideological reason for there being no 'police force' as we know it. A police force was associated with continental despotisms, agents of a centralised monarchy, and had no place in a country marked by parliamentary government and 'English liberty.' It was also the case, of course, that the early modern state had limited resources.

In any event, a criminal prosecution would be started by the victim deciding that he or she had

evidence of a crime and a suspect, and that person would be taken to the JP. The JP would take depositions, and if the evidence was sufficient (and there was a very low threshold) the JP would commit to prison to await trial (this was the principal purpose of prisons, to hold those waiting for the next session of the court). Statutes passed in the 1550s (the Marian bail statutes) removed almost all discretion from the JP in this regard. For the vast majority of offences committal to prison was mandatory.

The private nature of prosecution did not stop at apprehension. It was also up to the prosecutor to gather evidence, ensure that witnesses attend, and turn up in court him or herself to prosecute the case.

This system clearly gave victims of crime lots of discretion to decide whether to prosecute or not. More importantly, in relation to the discussion above about capital punishment, it gave them discretion about what to charge people with. Assume a shopkeeper caught someone stealing from his shop; this was a capital offence if the goods were worth 4 shillings. The shopkeeper could choose to prosecute claiming that the goods were worth 4sh or more, and the accused thus faced the possibility of death. Or the shopkeeper could value the goods at 3sh and 11 pence, and thus make the charge grand larceny. Or he or she could decide they were worth only 1 shilling, making the charge petty larceny and the penalty a whipping.

3) The Criminal Trial.

There were two principal levels of criminal court. Less serious offences were tried at Quarter Sessions of the Peace, presided over by JPs. This court sat quarterly in each county.

Almost all felonies (with grand larceny the only exception as the century wore on) were tried at Assizes. England had 12 royal judges in the 18th century, and they sat both in London and on circuit. They went out every year in twos to the forty counties, and sat in each county twice a year. Each pair would visit 6-7 counties in their circuit, which were known by geographical terms - the northern circuit, the western circuit etc. Hay's article describes the importance of the assize visit to local communities.

When the assize reached a county town the county clerk of the peace, usually a lawyer, would work from the depositions submitted by JPs to draw up the list of cases to be heard. The clerk drew up indictments - formal charges - against those waiting in jail. As each case came up the victim would present his or her evidence and witnesses, and the accused had the opportunity to make objections and ask questions and, once the prosecution case was closed, to present his or her own case. The judge was an active participant, asking questions of witnesses and sometimes effectively cross examining them. Jurors could also ask questions. Lawyers played hardly any role. Prosecutors had a right to be represented by a barrister, but hardly ever did so. The accused had no right to a lawyer until the 1830s, and while a judge could admit one on request, this hardly ever happened. Even when a lawyer was present, most judges limited them to arguing legal questions.

The 'trial' is thus best described, as one historian has put it, as a 'confrontation' between victim and accused, in which the drama and emotion of such a dramatic moment led jurors to a quick determination. Accused persons could rarely prepare for trial (they were committed to prison, had very few resources) and in any event would not have known how to 'prepare.' On average a trial lasted half an hour or so, including the time taken up for jury deliberation and verdict. Sometimes that deliberation was done while retired, but usually the jury just huddled together for a few minutes before giving their verdict.

A few more points about juries. They were called for the court session, and often served for many days in a row. They certainly served for many cases in a row in a single day. Some had done jury duty at a previous assize or at Quarter Sessions. Apart from the judge, therefore, by far the most experienced people in the court room were the jurors. As a result, and as a result also of what was often their familiarity with some of those appearing as prosecutors, witnesses, or accused, juries exercised their discretion. They not infrequently convicted or acquitted based on their view of whether the accused deserved capital punishment, and certainly found verdicts that would allow the accused to escape the gallows. To take up the example of prosecutorial discretion given above, even if the prosecutor decided to value the goods at 4 shillings, the jury could devalue them to remove the offence from capital punishment. This was known as 'pious perjury'.

An Introduction to Property, Authority and the Criminal Law

We begin with this article because it is a major historiographical piece in the writing about the history of crime and punishment. Before the 1970s the history of the criminal law and criminal justice was treated largely as the history of progress from the barbarism of the past to the enlightened present. In the first half of the nineteenth century everything I have talked about here changed - the number of capital offences was greatly reduced, imprisonment became the dominant mode of punishment, 'modern' policing was introduced, the criminal trial became more sophisticated as lawyers came to dominate it.

"Property, Authority and the Criminal Law" is a now classic piece, as controversial in some aspects today as it was when first written, and no less powerful. It played a major role in transforming the writing of criminal justice history from a concentration on largely administrative history in which the criminal law and legal institutions were seen as unproblematic, resting on a broad social consensus, to an examination of the broader social and political roles played by the criminal law.

Hay is not interested in 'defending' the old system, but he does argue that we cannot study the history of crime, punishment and criminal process simplistically, assuming it is unproblematic. We need rather to place institutions within a broader social and political context. That is, Hay tries to make sense of how it worked, what function it performed. As he puts it, if the old system was so bad and inefficient, why did it take so long to change it? His answer, of course, is that it worked - in context, within the political and economic confines and world views of the interests of the rulers of 18th century England.

Hay's article grew out of his study at what was termed the 'Warwick school' of English social history, dominated by E.P. Thompson. This school established social history as a major part of the historians' world view, and its interest was in the lives of working class and their interaction with, among other things, the state. Thus his article also asks how significant was criminal justice in asserting state or class control, was the law generally autonomous or was it subject to control by elites, was the law viewed by contemporaries as based on consensus?

Hay begins by looking at two conundrums that others had noted - expansion of capital statutes along with restraint in their use, and resistance to reform despite substantial criticisms of what seemed to many to be an "inefficient" system. Together these suggest that what is often called the "unreformed" criminal law and criminal justice system were in some sense "irrational". But, he says to himself, why assume that a system in place for so long, and favoured by the powerful, was "irrational"? Perhaps it served a purpose in the context in which it operated. And in that vein he discusses what that purpose was and how it was achieved. He says that "the criminal law was extremely important in ensuring ... that 'opinion' prevailed over 'physical strength'". That is, in ensuring that the few were able to retain their political and economic dominance of the many. It did this, not by relying simply on the terror of the gallows, but because it also functioned as "ideology".

The first question you should therefore seek to answer when reading the article is what does he mean by the idea that the law was an "ideological system"? He offers a short definition, but I'm not sure that that definition actually captures the complexity of his own argument.

In addition to thinking about what it means generally, it is as, if not more, important to ask how that ideology was constituted and how it worked? Hay delineates three elements of ideology - majesty, justice and mercy. What does he mean by each of these, and how did each operate to convince the populace of both the power and the fairness of the law? The argument in the article can be elusive. I don't think there is any great difficulty in taking apart and understanding the arguments about each of the three separate elements of "ideology", and indeed some aspects of them might seem very straightforward - "dressing up" the agents and institutions of the law is familiar enough, for example. But what is the bottom line? Do the separate elements combine into something larger? Do they need to? Was all this a "conspiracy"? (Some of Hay's critics say that that is what he is arguing). If you finish the article unclear about these very broad questions, don't worry; they will make for a fascinating discussion. One thing you should certainly take away from Hay is the very general idea, already noted, that criminal justice systems take their particular shape from the particular society in which they operate. There are many things about the system described that are "peculiarly English" - they are so because they are the product of pre-industrial English society.

Hay's article has often been criticised, in a variety of ways. Critics have pointed out that most prosecutors were lower-middle or working class people, not that different in socio-economic status than those prosecuted. Thus the law was not simply the tool of the elite. They have also said that the principal decision-maker, the jury, was not an elite institution (although it was property-qualified) and no system of overt class rule would use such an institution. It has also been stated that, in the words of Hay's most virulent critic, John Langbein, most of those tried and convicted were "petty

crooks” not “class warriors”, and that the criminal justice system had as little to do with politics as the garbage collection system - it was an unexceptionable instrument to deal with social blights that all acknowledged as such. Langbein also complains that in any event Hay’s thesis is untestable - any unfairness shows he is right, any fairness does so also because it’s part of the ideology.

Do any of these facts (assuming factual statements about the identity of prosecutors, jurors etc are true) disprove the Hay thesis? Does the untestability argument make sense to you?